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IN THE
COURT OF APPEALS OF INDIANA

GORDON NORTHRUP, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0605-CR-413
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-9908-CF-76

May 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

In this belated appeal, Appellant-Defendant, Gordon Northrup, Jr., appeals his sentence following his conviction pursuant to a guilty plea of Attempted Child Molesting as a Class B felony[1] and his admission to being a Habitual Offender.[2] The trial court sentenced Northrup to an aggregate forty-eight-year sentence in the Department of Correction. Upon appeal, Northrup challenges his sentence upon the following grounds: (1) the trial court erroneously sentenced him under the habitual substance offender statute rather than the habitual offender statute; (2) aggravators considered by the court to enhance his sentence for attempted child molesting to eighteen years were in violation of Blakely v. Washington, 542 U.S. 296 (2004); (3) the trial court erred in failing to attribute significant mitigating weight to his guilty plea and expression of remorse and in attributing aggravating weight to the victim's age; and (4) the forty-eight-year sentence was inappropriate in light of his character and the nature of his offense.

We reverse and remand with instructions.

According to the factual basis entered during the February 25, 2000 guilty plea hearing, in March of 1999, Northrup engaged in conduct, specifically, knowingly or intentionally pressing his penis against the vagina of S.B., a child whom he knew was ten years of age, in an attempt to perform or "submit to [sic]" sexual intercourse. Tr. at 15.

[1] Ind. Code § 35-41-5-1 (Burns Code Ed. Repl. 2004); Ind. Code § 35-42-4-3 (Burns Code Ed. Repl. 2004).

[2] Ind. Code § 35-50-2-8 (Burns Code Ed. Repl. 1998). The information alleging Northrup to be a habitual offender erroneously listed Indiana Code § 35-50-2-10 (Burns Code Ed. Repl. 1998), which addresses habitual substance offenders. The sentencing order finding Northrup to be a habitual offender does not include a statutory citation. The abstract of judgment, however, lists the erroneous citation to Indiana Code § 35-50-2-10.

Such action constituted a substantial step toward committing the crime of child molesting as a Class B felony.

Northrup was charged on August 5, 1999 with attempted child molesting as a Class A felony, attempted child molesting as a Class B felony, and two counts of child molesting as a Class C felony. On September 24, 1999, the State filed an information alleging Northrup to be a habitual offender. On January 12, 2000, the State filed an additional charge of child molesting as a Class A felony. On February 25, 2000, Northrup entered into a plea agreement whereby he agreed to plead guilty to attempted child molesting as a Class B felony and admit to being a habitual offender.[3] In turn, the State agreed to dismiss all remaining counts and not to recommend a specific length of sentence. During a March 22, 2000 sentencing hearing, the trial court sentenced Northrup to eighteen years executed for the attempted child molesting conviction, enhanced by an additional thirty years executed on the basis of his being a habitual offender.

On August 25, 2004, Northrup filed a petition for post-conviction relief. Following the trial court's appointment of counsel, counsel's motion to dismiss said petition and request for appointment of counsel at county expense to pursue proceedings under Indiana Post-Conviction Rule 2, and the court's granting such motion, on October 7, 2005, Northrup filed a motion requesting permission to file a belated notice of appeal.

[3] During the plea hearing, Northrup admitted to five prior felony convictions, among them a June 3, 1985 theft conviction, for which he received a four-year sentence; a second June 3, 1985 conviction for theft for which he received a two-year sentence; a May 11, 1992 conviction for theft and possession of a handgun without a license, for which he received a three-year sentence; an October 31, 1994 conviction for confinement resulting in serious bodily injury, for which he received a fifteen-year sentence; and a March 7, 1995 conviction for theft, for which he received a three-year sentence.

The court granted Northrup's motion, and he filed a belated notice of appeal on October 7, 2005. This court, upon receiving nothing following the December 12, 2005 Notice of Completion of Clerk's Record, dismissed this appeal on February 21, 2006. Following the trial court's grant of Northrup's second motion to file a belated appeal, Northrup filed a notice of appeal on March 20, 2006.

Northrup's first claim upon appeal is that he was erroneously sentenced to an additional thirty years under Indiana Code § 35-50-2-10, in spite of the fact that Indiana Code § 35-50-2-10(f) authorizes an additional sentencing range of only between three and eight years. The State does not respond to Northrup's claim on this point.

We recognize that the State, in alleging Northrup to be a habitual offender, erroneously cited the habitual substance offender statute, I.C. § 35-50-2-10, rather than the habitual offender statute, I.C. § 35-50-2-8. Nevertheless, we observe that none of the offenses listed in the habitual offender information involved a substance offense and that Northrup was advised during the guilty plea hearing not only of the substantive offenses comprising the habitual offender information but also that he faced a sentencing range of from ten to thirty years. Further still, during the guilty plea hearing, Northrup admitted each individual crime alleged in the habitual offender allegation, and all references were to Northrup as a habitual offender rather than as a habitual substance offender. Although Northrup now claims upon appeal that, pursuant to the habitual substance offender statute permitting only a three-to-eight-year sentence enhancement, his thirty-year sentence enhancement is impermissible, he makes no claim that he misunderstood either the charges against him or his potential sentence as a habitual offender at the time of his plea.

Because all parties, including Northrup, operated under the assumption that he was being charged as and found to be a habitual offender, not a habitual substance offender, we decline his challenge to his sentence due to the erroneous statutory reference in the charging information and abstract of judgment. An information which enables the accused and the court to determine the crime for which conviction is sought satisfies due process. Grant v. State, 623 N.E.2d 1090, 1093 (Ind. Ct. App. 1993), trans. denied. While we award no relief as a result of such error, we remand to the trial court with instructions to correct the abstract of judgment and forward a corrected copy to the Department of Correction.

Northrup further challenges his eighteen-year sentence for his attempted child molesting conviction by claiming that the trial court erred by considering aggravators which were not found by a jury beyond a reasonable doubt as required by Blakely. Northrup concedes that the trial court was entitled to consider his criminal history but claims its consideration of other factors, including (1) the victim's age, (2) the devastating effect on the victim and her family, (3) that he had transmitted a sexually transmitted disease to the victim, (4) that prior attempts at rehabilitation were unsuccessful, and (5) that he was in need of prison, was in violation of Blakely.

Upon sentencing Northrup, the trial court stated the following:

> "Mr. Northrup, the Court considers your criminal history—the prosecutor has summarized it—that's an aggravating factor. The Court looks at the age of the victim. That's an aggravating factor. The Court looks at the effect of your conduct on the victim and her family, which is an aggravating factor. There have been prior attempts at rehabilitation. The Court finds as an aggravating factor that you had a sexually transmitted disease and you knowingly and [sic] intentionally transmitted it to her. Or

> you knew or should have known that what you were doing could transmit it to her and it's not something that's ever going to go away during her lifetime. You were on probation at the time. The aggravators outweigh the mitigators. There [are] no mitigators. I'm going to sentence you to the Department of Correction for forty-eight years, all executed. Thank you." Sentencing Tr. at 33.

In addition to the above aggravators, the court listed in its sentencing order the additional aggravator of "the defendant is in need of correctional or rehabilitative treatment that can best be provided by his commitment to a penal facility."[4] App. at 92.

We first observe that Northrup is making this Blakely challenge in a belated appeal pursuant to Indiana Post-Conviction Rule 2. Our Supreme Court stated in Smylie v. State, 823 N.E.2d 679, 688-91 (Ind. 2005), cert. denied, 126 S.Ct. 545, that Blakely applied retroactively to all cases on direct review at the time Blakely was announced. Northrup filed his belated notice of appeal on March 20, 2006. Post-Conviction Rule 2(1) provides that a belated notice of appeal permitted by the trial court "shall be treated for all purposes as if filed within the prescribed period." "'New rules for the conduct of criminal prosecutions are to be applied retroactively to cases pending on direct review or not yet final when the new rules are announced.'" Sullivan v. State, 836 N.E.2d 1031, 1035 (Ind. Ct. App. 2005) (quoting Powell v. State, 574 N.E.2d 331, 333 (Ind. Ct. App. 1991)). Because Northrup was given permission to file this belated appeal, he may rely on Blakely even though he was sentenced more than four years before it was decided

[4] In reviewing a defendant's sentence, we look to the sentencing statement and the entire record. See Glass v. State, 801 N.E.2d 204, 208 (Ind. Ct. App. 2004).

because his case was "'not yet final'" when Blakely was decided.[5] Sullivan, 836 N.E.2d at 1035 (quoting Powell, 574 N.E.2d at 333).

In Blakely, the United States Supreme Court applied the rule set forth in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), wherein the Court stated, "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.'" 542 U.S. at 301. The Blakely Court held that the sentencing scheme at issue violated the petitioner's Sixth Amendment right to a trial by jury. 542 U.S. at 313. The Court noted that precedent made clear that the "'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." Id. at 303 (emphasis in original). The Court further clarified, stating that the relevant statutory maximum for Apprendi purposes "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Id. at 303-04 (emphasis in original).

Blakely is not concerned, primarily, with what facts a judge uses to enhance a sentence, but with how those facts are found. Trusley v. State, 829 N.E.2d 923, 925 (Ind.

[5] In Gutermuth v. State, 848 N.E.2d 716, 726 (Ind. Ct. App. 2006), trans. granted, a panel of our court cited Sullivan in holding that Blakely applies retroactively to appeals raised pursuant to Indiana Post-Conviction Rule 2(1) where the availability of appeal via Post-Conviction Rule 2(1) had not been exhausted when Blakely was announced. Our Supreme Court granted transfer in Gutermuth, thereby vacating that opinion, and heard oral argument regarding the question of Blakely as applied to belated appeals in the consolidated oral argument Boyle, Gutermuth, Medina, and Moshenek v. State on March 22 of this year. In the absence of a decision on the question of the applicability of Blakely to belated appeals, we rely upon Sullivan and consider Northrup's Blakely argument as if it were properly raised. But see Hull v. State, 839 N.E.2d 1250, 1256 (Ind. Ct. App. 2005) and Robbins v. State, 839 N.E.2d 1196 (Ind. Ct. App. 2005).

2005). Under Blakely, the trial court may enhance a sentence based only on those facts that are established in one of several ways: (1) as a fact of prior conviction; (2) by a jury beyond a reasonable doubt; (3) when admitted by a defendant; and (4) in the course of a guilty plea where the defendant has waived Apprendi rights and stipulated to certain facts or consented to judicial factfinding. Id.

In his challenge pursuant to Blakely, Northrup first claims the trial court erred upon considering the age of the victim as an aggravator. In fact, during the plea hearing, Northrup admitted that his victim was ten years old. (Guilty Plea Tr. 18) Further, in Northrup's statement in the Pre-Sentence Investigation Report (PSI) as well as during sentencing, he alluded to the fact that his victim was a "kid," that he hoped the victim could "go on and grow and mature" and not have this "affect her negatively the rest of her life." Sentencing Tr. at 27. Given Northrup's multiple acknowledgements that his victim was young and a ten-year-old, the court's consideration of the age of the victim was not an improper aggravator under Blakely.

Northrup also challenges upon Blakely grounds the court's consideration as an aggravator of the devastating effect of his actions on the victim and her family. Again, during sentencing Northrup acknowledged "all the heartache and humiliation and turmoil" as well as "all the hurt" he had put the victim and her family through. Sentencing Tr. at 26, 27. In light of Northrup's acknowledgement of the devastation his actions had caused the victim and her family, we conclude this aggravator was properly considered and did not run afoul of Blakely.

Northrup's third challenge to the aggravators upon Blakely grounds is to the court's consideration of the fact that he had a sexually transmitted disease and knew the risk of infecting the victim. The PSI states that Northrup had indicated to the probation officer writing the report that he was unaware that he had genital warts and that he had never received medical treatment. It is clear that Northrup did not admit this fact, nor did he waive Apprendi rights, which were not in existence at the time of the plea, nor did he consent to judicial factfinding in his plea. The trial court's use of this factor as an aggravator therefore violated Blakely. Given the nature of this aggravator and the likelihood that it carried heavy aggravating weight, we are not convinced that the trial court would have entered the same sentence had it not considered this aggravator. We conclude that the court's consideration of this impermissible aggravator merits reversal of Northrup's sentence and remand for resentencing.

Northrup's fourth challenge to the aggravators upon Blakely grounds alleges that the trial court erred in considering as an aggravator that prior attempts at rehabilitation were unsuccessful. Our Supreme Court has held that aggravators such as "failure to rehabilitate" are properly categorized as "conclusory 'observations about the weight to be given to facts.'" Neff v. State, 849 N.E.2d 556, 560 (Ind. 2006) (quoting Morgan v. State, 829 N.E.2d 12, 17 (Ind. 2005)). As such, they "'merely describe the moral or penal weight of actual facts'" and do not stand as separate aggravators when the factual basis that supports the conclusion also serves as an aggravator. Id. (quoting Morgan, 849 N.E.2d at 17). The trial court, in finding as an aggravator that prior attempts at rehabilitation were unsuccessful, was making a commentary on Northrup's criminal

history. While the trial court was entitled to make such a legal judgment, and in doing so did not run afoul of Blakely, it was not permitted to attribute aggravating weight both to Northrup's criminal history and to its moral or penal commentary on such history. Neff, 849 N.E.2d at 560 (citing Morgan, 829 N.E.2d at 17-18). To the extent the trial court attributed additional aggravating weight to Northrup's failed attempts at rehabilitation beyond that which it attributed to his criminal history, it was in error to do so.

Northrup's final challenge upon Blakely grounds is to the trial court's consideration as an aggravator that he was "in need of correctional or rehabilitative treatment that [could] best be provided by his commitment to a penal facility." App. at 92. This factor is also derivative of Northrup's criminal history and, while therefore not contrary to Blakely, is similarly impermissible insofar as it was given additional aggravating weight beyond the aggravating weight of the criminal history upon which it was based. Riehle v. State, 823 N.E.2d 287, 298 (Ind. Ct. App. 2005) (citing Teeters v. State, 817 N.E.2d 275, 279 (Ind. Ct. App. 2004)), trans. denied.

Northrup also challenges his sentence by claiming that the trial court did not give due mitigating weight either to his guilty plea or to his claimed remorse and that the court improperly attributed aggravating weight to the victim's age, which Northrup claims was already an element of the offense. We bear in mind that sentencing determinations, including whether to adjust the presumptive sentence,[6] are within the discretion of the

[6] The amended version of Indiana Code § 35-50-2-5 (Burns Code Ed. Supp. 2006) references the "advisory" sentence, reflecting the April 25, 2005 changes made to the Indiana sentencing statutes in response to Blakely. Since Northrup committed the crime in question in March 1999, before the effective date of the amendments, we apply the version of the statute then in effect and refer instead to the presumptive sentence. See Ind. Code § 35-50-2-5 (Burns Code Ed. Repl. 2004).

trial court. See Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004). If a trial court relies upon aggravating or mitigating circumstances, it must do the following: (1) identify all significant aggravating or mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. Id.

When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. Stout v. State, 834 N.E.2d 707, 710 (Ind. Ct. App. 2005), trans. denied. The trial court is not required to give the same weight as the defendant does to mitigating evidence. Fugate v. State, 608 N.E.2d 1370, 1374 (Ind. 1993). A single aggravating circumstance may be sufficient to justify an enhanced sentence. McNew v. State, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied. Further, a trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. Id.

With respect to Northrup's claim that his guilty plea merited mitigating weight, we observe that a trial court should be inherently aware that a guilty plea is a mitigating factor, but we note that such plea is not necessarily a significant mitigating factor. See Scott v. State, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), trans. denied. Here, although in

taking the plea, Northrup saved the State the resources necessary for trial, the evidence indicating his guilt in the instant case was sufficiently strong and the plea sufficiently beneficial such that entering into the plea agreement may have been as much a pragmatic decision as an effort at taking responsibility. Indeed, the victim knew Northrup, who was her frequent babysitter, and claimed he had initiated sexual acts with her, causing her to develop a diagnosed case of genital warts. With respect to the beneficial nature of the plea, we observe that Northrup was charged with multiple counts, including child molesting as a Class A felony, attempted child molesting as a Class A felony, and two counts of child molesting as Class C felonies, all of which were dropped pursuant to the plea agreement. We find no error in the trial court's refusal to afford Northrup's plea significant mitigating weight.

With respect to Northrup's alleged remorse as a mitigating factor, we observe that while a defendant's expression of remorse may be considered as a valid mitigating circumstance, the trial court is in the best position to determine whether a defendant genuinely has remorse. Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). Here, testimony at sentencing by Tippecanoe County Sheriff's Department Deputy Travis Dowell suggested that Northrup appeared remorseful when he was confessing on a cassette tape, but that the instant the cassette tape stopped running, his attitude of remorse changed, and he even made a sexual comment and gesture with respect to the incident at issue. We decline to second-guess the trial court's evaluation of Northrup's remorse or lack thereof.

Northrup further claims that the trial court erroneously attributed aggravating weight to the victim's age, which he claims was an element of the crime for which he was convicted. Northrup is correct that a trial court may not use a factor constituting a material element of an offense as an aggravating circumstance. See Henderson v. State, 769 N.E.2d 172, 180 (Ind. 2002). While a trial court may consider the particularized circumstances of the crime as an aggravating factor, the court should specify why a defendant deserves an enhanced sentence under the particular circumstances. Id. The crime of child molesting requires that a child be under the age of fourteen. See I.C. § 35-42-4-3. Here, the trial court referred to the fact that the victim was only ten years old as an aggravator but did not offer particularized circumstances to substantiate its consideration of this factor as a particularly egregious form of the crime of attempted child molesting. Upon remand, we encourage the trial court to provide specific facts and reasons to support its finding of aggravating circumstances. See Buchanan v. State, 767 N.E.2d 967, 971 (Ind. 2002).

In sum, with respect to Northrup's sentencing claims, we have found that the trial court erred upon Blakely grounds in considering as an aggravator the fact that Northrup knew he had a sexually transmitted disease and understood the risk of infecting the victim. We have also determined that the trial court should not have attributed additional aggravating weight to the factors of "failure to rehabilitate" and "need for correctional treatment of penal facility," both of which were derivative of the separate aggravator of Northrup's criminal history. Further, while we cannot say that the victim's age of ten may not be considered as a separate aggravator, this finding should be supported by

specific facts and reasons indicating why such age contributed to a particularly egregious form of attempted child molesting. Accordingly, we instruct the trial court upon remand to resentence Northrup in a manner not inconsistent with this opinion. In addition, we instruct the court to correct the abstract of judgment to reflect the habitual offender statute, I.C. § 35-50-2-8, and to forward a corrected copy to the Department of Correction.

Having so found, we find it unnecessary to address Northrup's claim pursuant to Indiana Appellate Rule 7(B) that his sentence was inappropriate in light of his character and the nature of his offense.

The judgment of the trial court is reversed, and the cause is remanded to the trial court with instructions.

SHARPNACK, J., and CRONE, J., concur.